REMARKS

Claims 1 and 3-7 were on appeal and are now under examination. Claims 1, 6, and 7 are amended herein, and claim 8 is new. Claims 1, 6, and 7 are amended to clarify the claimed subject matter. Non-limiting support for the amendments to the claims can be found in the claims as originally filed and for example, in paragraph [0099] of the published application, U.S. Application No. 2004/0077103. Support for new claim 8 can be found, for example, in paragraph [0079] of the published application.

No new matter is introduced by this Amendment, entry thereof is respectfully requested. Upon entry of this Amendment, claims 1 and 3-8 are pending.

In addition to the arguments present in the Reply Brief filed September 24, 2007 and the Appeal Brief filed April 25, 2007, please consider the following remarks.

I. Double Patenting Rejection

Claims 1 and 3-7 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-13 and 1-24 of copending Application No. 11/022,297 and 10/792,258 respectively.

As this is a provisional rejection, Applicants will address the rejection upon indication of allowable subject matter by the Examiner or once the rejection is no longer provisional.

II. Rejection of Claims 6 and 7 under 35 U.S.C. § 112

Claims 6 and 7 remain rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The Office Action states that "[c]laim 6 is confusing what structure is contemplated by the claimed second surface and how it interacts with the nonporous surface." As stated in amended claim 6, "said assay device comprises a capillary space between said nonporous surface and a second surface spaced at a capillary forming distance from said nonporous surface". The second surface interacts with the nonporous surface by forming a capillary space with the nonporous surface.

The Office Action states that "[c]laim 7 is vague and indefinite the meets and bounds of the claim. No structure is claimed that further limits the subject matter of any one of the previous claims 1-5. As stated in amended claim 7, "said assay device does not comprise a second surface positioned at a capillary forming distance from said nonporous surface." Applicant believes that the lack of a second surface as claimed further limits the subject matter of claims 1-5.

III. Rejection of Claim 1, 3-5 and 7 under 35 U.S.C. § 102(b)

Claims 1, 3-5, and 7 remain rejected under 35 U.S.C. 102(b) as allegedly anticipated by Findlay, *et al.* U.S. Patent No. 5,514,550 (Findlay) or Wu, U.S. Patent No. 5,387,510 (Wu).

The Office Action states with regard to the Appellant's Remarks in the Appeal Brief mailed April 25, 2007 that:

> [t]hese remarks are not commensurate in scope with the pending claims. The instant claims do not exclude additional elements that could be used in combination with the antibodies to determine the target ligand. The Office maintains Findley et al. teach use of antibodies to detect a target ligand and clearly anticipates claim 1.

The claim 1 has been amended to more clearly indicate the claimed subject matter. Claim 1 as amended recites that "particles comprise antibodies or fragments thereof immobilized to said particles, wherein the antibodies or fragments thereof are capable of binding said one or more target ligands". However, neither Findlay nor Wu teach (a) antibodies or fragments thereof immobilized to particles or (b) antibodies or fragments thereof that are capable of binding one or more target ligands.

Findlay teaches away from the claimed subject matter by disclosing that the antibodies are a part of a second probe used to detect a target ligand, where the second probe comprises a nucleic acid complementary to the target nucleic acid and an antibody to be used as a detectable moiety on column 7, lines 5-26:

> The present invention also encompasses a method for using the test article described herein to detect a predetermined nucleic acid. The general description of the method is provided above. In one embodiment, the test article is used in a sandwich hybridization assay where a second probe is used to provide detection of the resulting three-part hybrid. This second probe is also complementary to the predetermined nucleic acid, and contains a moiety which provides detection in

> some manner (as discussed above). Preferably, the second probe is labeled with avidin, biotin, antibody, antigen, hapten, lectin, sugar (or another specific binding moiety), or other detectable moieties described below.

Wu teaches away from the claimed subject matter by disclosing that antibodies are bound to a primer and used as a means for detection on column 11, lines 45-51.

> In a preferred embodiment, one of the primers is labeled with a specific binding ligand such as biotin, an antibody or lectin. The labeled primer provides (through amplification) an amplified target nucleic acid which has the specific binding ligand attached. This amplified nucleic acid is detected using a detectably labeled receptor for specific binding ligand.

Because neither Findlay nor Wu disclose each and every limitation of claim 1, the Applicant respectfully requests withdrawal of the above rejection with respect to claim 1 and claims 3-7 dependent on claim 1.

IV. Rejection of Claim 5 under 35 U.S.C. §103(a)

Claim 5 remains rejected under 35 U.S.C. §103(a) as allegedly unpatentable over Findley or Wu in view of Oosta, *et al.*, U.S. Patent No. 5,478,751 (Oosta). As stated in the Reply Brief mailed September 24, 2007, Applicant believes that the rejection is intended to refer to claim 6. Applicant will refer to claim 6 rather than claim 5.

In addition to the arguments presented in the Reply Brief mailed September 24, 2007 that establish a priority date for the claimed subject matter earlier than the priority date of Oosta, Applicant believes that each and every limitation of claim 6 is not disclosed by combination of Findley or Wu in view of Oosta.

Claim 6 is dependent on claim 1. As discussed above, neither Findlay nor Wu teach each and every limitation of claim 1. For example, Oosta does not teach or suggest particles that "comprise antibodies or fragments thereof immobilized to said particles". Oosta does disclose the use of particles for detection in column 6, lines 8-18:

> One such detection method will involve the use of particles, where particles provide for light scatter or the change of the rate of flow. Particles may be, but are not intended to be limited to, cells, polymeric particles which are immiscible with a liquid system, latex particles, charcoal particles, metal particles, polysaccharides or protein particles, ceramic particles, nucleic acid particles, agglutinated particles

or the like. The choice of particles will depend on the method of detection, the dispersability or the stability of the dispersion, inertness, participation in the change of flow, or the like.

However, Oosta does not teach or suggest that particles comprise antibodies or that antibodies are immobilized to the particles. Therefore, every limitation of claim 1 and dependent claims 3-7 have not been taught or even suggested. Based on the foregoing, the Applicant respectfully requests withdrawal of the above rejection.

CONCLUSION

Applicants respectfully submit that the pending claims are in condition for allowance. If any matters remain outstanding, the Examiner is encouraged to contact the undersigned at the telephone number listed below so that they may be resolved without the need for additional action and response thereto.

FEE AUTHORIZATION

The Commissioner is authorized to charge any additional fees which may be required, including petition fees and extension of time fees, to Deposit Account No. 23-2415 (Docket No. 36671-716.302).

Respectfully submitted,

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Date: November 5, 2008

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